

IN THE HIGH COURT OF TANZANIA

MTWARA DISTRICT REGISTRY

AT MTWARA

CRIMINAL APPEAL NO. 26 OF 2023

(Originating from Criminal Case No. 21 of 2023 at District Court of
Kilwa at Masoko)

ADAMU MSHAMU ALLY..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGEMENT

Date of last order: 04.09.2023

Date of Judgement: 03.11.2023

EBRAHIM, J.:

The Appellant herein was charged and convicted for the offence of grave sexual abuse contrary to **Section 138C (1) (a) and (2)(b) of the Penal Code, [Cap 16 R.E 2022]**. It was alleged by prosecution that the Appellant on the 24th day of January, 2023 at Singino Kwamkocho Village within Kilwa District in Lindi Region, for sexual gratification

compelled one HAN (identity concealed) a girl of 10 years to suck his genital parts and ejaculated into her mouth.

The background of the case could be well established from the evidence of the victim, PW1. She told the court that she is 10 years old living with her father and mother. On 24th January, 2023 at around 1600hrs she went to pick some mangoes at Shaweji Farm where she met the Appellant who took her to the bush and inserted his penis into her mouth and asked her to suck him. She sucked him and when he ejaculated, the victim spat the sperms. The Appellant forced her to suck him again and swallow the sperms. He did so for the 3rd time then he released her threatening her not to tell anybody. On running home, the victim met with one Hamadi Lipendi and told her about the ordeal. Hamadi run after the Appelant but could not find him. PW1 said she know the Appellant because he passes near their home on the way going to Kivinje. The matter was reported to the police, examination was conducted where she vomitted and was prescribed some medicine. **PW2** one **Omary Said Ngwata** was among the first persons to be called by the mother of PW1. He said PW1 explained to him that the Appellant forced him to suck his penis for sexual

gratification. He said he knows the Appellant for a long time as he is a neighbor to the Appellant's sister. At the police they were given RB. He searched for the Appellant and apprehended him at Singino and sent him to Kivinje Police Post. **PW3, Ahmadi Said Hamisi**, a father of the victim said he also knows the Appellant since he was a child that he lives at Singino. He passes on his way going to Kivinje several times where PW3's house is located. He tendered a clinical card of the Victim which was admitted as **exhibit PE1**. **PW4** was an Assistant Medical Officer who examined PW1 and observed that was vomiting whitish discharge which was later examined and observed to be semens. She tendered PF3 which was admitted as **exhibit PE1**.

PW5 Ahmad Omary @ Lipende said PW1 found him at home and later went to get mangoes. However, he later heard someone calling and he saw PW1 running and he caught her hand. She told him that Adamu forced her to suck his penis. He run after the Appellant but could not find him. He advised her family to go to the hospital. **PW6, WP 8086 Detective Amina** investigated the case after receiving the Appellant on 25th day of January 2023 from Kivinje Police Post. She tendered a sketch map which was admitted as **exhibit PE3**.

in his defence, the Appellant (**DW1**) told the court that on 24th January 2023 he arrived at Singino coming from Somanga around 1730hrs. He arrived at Kivinje around 1800hrs. It was on 25th January 2023 around 0900 hrs when he was going to Somanga to work and on reaching at Singano, he was arrested by a group of people and taken to Kivinje Police Post on the allegations that he raped a child. Responding to cross examination questions he denied to have committed the alleged offence but he said that the father of the child lives at Singino and he passes there several times. He denied to know the girl until she saw her in court. He said he picked a mango at Singino and walked away but did not commit the grave sexual abuse.

The Appellant called his wife to prove his alibi. **DW2, Halima Mshamu Ally** told the court that the Appellant arrived home on 24th January 2023 around 2030hrs and slept until morning when he went to the shore and returned at 0930hrs. He freshened up and left to Singino accompanied by his friend and young brother. It was around 1030hrs that she received a phone call that the Appellant has been beaten and taken to the police.

After hearing and evaluating the evidence from both sides, the trial court found the Appellant guilty, convicted and sentenced him to 20 years' imprisonment. He also ordered him to pay compensation of Tshs. 1,000,000/- to the victim. Aggrieved, the Appellant has preferred the instant appeal raising six grounds of appeal complaining that the case was planted on him and prosecution did not prove the case beyond reasonable doubt. He faulted the trial court for basing its conviction on the weakness of the defence side whilst there were no eye witnesses. He complained that the doctor's evidence did not prove that it was the Appellant who committed the offence of grave sexual abuse to the victim.

When the case was called for hearing, the appellant appeared in person whilst the Republic had the services of Mr. Stephen Kondoro, learned State Attorney. When accorded the opportunity to address the court on the appeal, the Appellant adopted his grounds of Appeal and told the court that he did not do the offence hence he should be set free.

Mr. Kondoro, responding to the 1st ground of appeal told the court

that the case can be proved by the victim in terms of **section 127(6) of the Evidence Act, Cap 6 RE 2022** and does not necessarily in all cases need to be corroborated. He submitted on the 2nd ground of appeal referring to the 1st ground of appeal that there is enough evidence to prove the case and under **section 138C(1)(a) of the Penal Code Cap 16 RE 2022**, the victim gave evidence on how the Appellant grabbed and assaulted her. He referred the court to exhibit PE1 – PF3 and to the case of **Fahad Alifa Vs R**, Criminal Appeal No. 573/2020 on the holding that the victim of sexual assault is enough independent witness to prove the case. He added that reading together with **section 127(6) of the Evidence Act**, prosecution case was proved beyond reasonable doubt.

He said on the 4th and 5th grounds of appeal that prosecution evidence was stronger and credible. He prayed for the appeal to be dismissed.

In rejoinder, the Appellant said he was not taken to the hospital for examination.

Going through the grounds of appeal and the rival submissions by the learned State Attorney, it is apparent that the Appellant's main ground of appeal is that prosecution's case was not proved beyond

reasonable doubt to mount a conviction against him.

It is trite law that first appeal is in the form of rehearing. In that regard, first appellate court is charged with a duty of re-evaluating the entire evidence, subjecting it to a critical scrutiny and arrive at a different findings of facts if merited. The same is done in observant of the fact that the appellate court was not privileged to observe the demeanor of the witnesses as illustrated in the case of **Mzee Ally Mwinyimkuu@ Babu Seya Vs Republic**, Criminal Appeal No. 499 of 2017.

The general rule in criminal cases is that the burden of proof lies with the prosecution - **Ali Ahmed Saleh Amgara v R** [1959] EA 654) and the guilt of the accused is never gauged on the weakness of his defence. Rather, the accused's conviction shall be based on the strength of the prosecution's case. The Court of Appeal in the case of **Christina s/o Kale and Rwekaza s/o Benard vs Republic**, TLR [1992] at page 302 and **Marwa Wangiti Mwita and Another vs Republic** 2002 TLR Page 39 held that the standard of proof is neither shifted nor reduced, it remains constant that the prosecution has a duty to establish the case beyond reasonable doubts.

In the instant case, **PW1** stated at the citation of her particulars before the Magistrate that she is 10 years old; the fact that was proved by her father, **Ahmad Said Khamis (PW3)** who told the court that PW1 was born in September 2012. She testified how the Appellant on 24th January, 2023 at around 1600hrs when she went to pick some mangoes at Shaweji Farm took her to the bush and inserted his penis into her mouth and asked her to suck him three times and ejaculated on her mouth. She told the court that she knows the Appellant as he passes near their home almost every day on the way going to Kivinje. She also explained how she met with **Ahmadi Lipendi (PW5)** when she was running home and told him about the ordeal and mentioned the Appellant.

It is the position of the law that mentioning the accused at the earliest stage confirm the witness's credibility - **Marwa Wangiti Mwita v. Republic, [2002] TLR 39.**

PW3 also confirmed to know the Appellant and that their home is near the way going to Kivinje.

The fact that PW1 went to pick the mangoes and was later found running home was supported by the testimony of **Ahmad Lipendi**

(PW5) who told the court that PW1 found him at home and later went to get mangoes. Sometimes later, he heard someone calling and he saw PW1 running. He caught her hand and she told him that Adamu forced her to suck his penis. He run after the Appellant but could not find him. Again, the fact that PW1 swallowed the semen was observed by **PW4** an Assistant Medical Officer who examined PW1 who vomitted vomiting whitish discharge which was later examined and observed to be semen. She tendered PF3 which was admitted as **exhibit PE1**.

The Appellant complained that the trial court wrongly convicted him while the doctor PW4 did not prove that he was the one who committed the offence. The fact is, the evidence of the doctor was not to prove who committed the offence, rather, was to prove as to whether the alleged act was committed to the victim. In this case, she confirmed that PW1 vomited the semen after the whitish discharge coming from PW1 was tested in the laboratory and found to be semen. PW4 observations supported the testimony of PW1 that the Appellant ejaculated on her mouth and forced her to swallow his sperms.

Indeed, it is the law that in sexual offences the best evidence is that of the victim of offence. This is according to **Section 127 (6) of the Evidence Act, [Cap. 6 R.E 2022]** and the CAT decisions in a number of cases like the **Selemani Makumba v Republic** [2006] TLR 379; and the case of **Edward Nzabuga v. Republic**, Criminal Appeal No. 136 of 2008, Court of Appeal of Tanzania at Mbeya (unreported) to mention but a few. However, the story on what befallen the victim of sexual assault should not be taken wholesale without scrutinizing and testing the truthfulness of the same - **Mohamed Said v. Republic**, Criminal Appeal No. 145 of 2017 CAT at Iringa.

It is the cardinal principle of the law that every witness testimony deserves credence unless there is cogent reason not to be believed – **Goodluck Kyando V R**, Criminal Appeal No 118/2003.

I am also aware that the assessment of credibility of a witness is a province of the trial court when it comes to demeanor. The appellate court can determine the credibility of a witness on looking at the coherence of the testimony of the witness; and in considering with the testimony of other witnesses if any. The Court of Appeal had in the case of **Nyakuboga Boniface vs Republic (Criminal Appeal 434 of**

2016) [2019] TZCA 461 (29 November 2019, TANZLII), where it referred the case of **Shabani Daud Vs Republic, Criminal Appeal No. 28 of 2001**, held that: -

" The credibility of a witness can also be determined in other two ways that is, one, by assessing the coherence of the testimony of the witness, and two, when the testimony of the witness is considered in relation to the evidence of other witnesses..."

Tailoring the above principles to our instant case in testing the truthfulness of the evidence of PW1, PW1 told the court the account of what had befallen her which was coherently corroborated by the testimony of PW2, PW4 and PW5.

Thus, the coherence of PW1's testimony makes this court believe her credence and reliability of her testimony as illustrated in the cited case of **Goodluck Kyando VR, (supra)** since there was no cogent reason for disbelieving her.

I am saying so because, I dutifully followed the defence of the Appellant and his wife.

DW1 told the court that on 24th January 2023 he arrived at Singino coming from Somanga around 1730hrs. He arrived at Kivinje around

1800hrs. He was arrested at Singino on 25th January 2023 around 0900 hrs on his way to work at Somanga. He denied to have committed the offence but admitted that the father of PW1 lives at Singino and he passes there several times. He denied to know the girl until he saw her at the court. He however admitted to have picked a mango at Singino and walked away but did not commit the grave sexual abuse.

From the Appellant's own testimony, he passed at the area where the offence was committed on the day i.e., 24.01.2023 around 1730hrs.

PW1 said she left home going to pick mangoes at the area around 1630hrs. Further, according to the testimony of PW5, PW1 passed by his house to go and collect mangoes around 1700hrs of 24.01.2023.

The series of events as narrated by prosecution witnesses tally with what was explained by the Appellant himself in placing him at the scene of the crime.

The Appellant called his wife to prove his alibi. **DW2, Halima Mshamu Ally** however told the court that the Appellant arrived home on 24th January 2023 around 2030hrs and slept until morning.

Thus, as correctly observed by the trial court, the testimony of DW2 did not assist to prove the Appellant's alibi as it did not shake

prosecution's case. DW2 saw her husband on the incident day at 2030hrs whilst the offence was committed between 1630hrs to 1730 hrs.

In the circumstances therefore, like the trial court, I find no difficulty in disbelieving the Appellant.

The Appellant complained that the testimony of PW1 was not corroborated. As alluded earlier, much as the law allows the sole evidence of the victim of sexual offence so long as it passes credibility test, still, the testimony of PW4 and PW5 although not eye witnesses, corroborated the series of events as narrated by PW1. Moreover, this court has already ruled out earlier that the testimony of PW1 passes trustfulness test.

As for the complaint that the conviction based on the weakness of his defence, the same is not true. Prosecution's case was based on the strong evidence adduced by prosecution witnesses particularly PW1, PW4 and PW5. In-fact some of the facts were confirmed by the Appellant himself like the time he passed at Singino and that he also picked mangoes. Also, that he knew where the father of PW1 lived and he passes there several times.

The evidence by prosecution against the Appellant is overwhelming hence removing the doubt that the case could have been planted or fabricated against the Appellant as he complained.

From the above background, I find that prosecution side managed to discharge its burden by proving this case beyond reasonable doubt. Consequently, I find this appeal to be unmeritorious and I dismiss it in entirety.

Accordingly ordered.



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

R.A Ebrahim

JUDGE

Mtwara

03.11.2023.